FILED BY CLERK
FEB -4 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GERARDO SOLAREZ LOPEZ, Appellant.	)	2 CA-CR 2010-0210 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091957

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Gerardo Solarez Lopez — Florence
In Propria Persona

The Law Offices of Stephanie K. Bond, P.C.
By Stephanie K. Bond — Tucson
Attorney for Appellant

B R A M M E R, Presiding Judge.

¶1 Following a three-day jury trial, appellant Gerardo Lopez was found guilty of two counts of sexual assault and one count each of attempted sexual assault, sexual abuse, and kidnapping. The trial court sentenced him to concurrent and consecutive,

presumptive prison terms totaling 36.5 years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record thoroughly but found no arguable issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, she has provided a "detailed factual and procedural history of the case with citations to the record," and asks this court to search the record for error. Lopez has filed a supplemental brief raising various issues, none of which require reversal. We affirm.

¶2 Viewing the evidence in the light most favorable to sustaining the verdict, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), we find it sufficient to support the jury's finding of guilt and we therefore reject Lopez's argument to the contrary. When the victim, S., asked Lopez for directions to a nearby restaurant, he offered to show her a shortcut through the desert. After they reached the desert area, Lopez struck S. in the head, dragged her next to a nearby wall, ordered her to pull up her shirt, grabbed her breasts, forced her to perform oral sex on him, inserted his penis into her vulva, and tried to insert his thumb into her anus. *See* A.R.S. §§ 13-1001(A), 13-1304(A)(3), 13-1404(A), 13-1406(A).

¶3 Lopez points out that no semen or spermatozoa and none of his deoxyribonucleic acid (DNA) was found on S.'s body and that a DNA sample taken from his penis did not match S.'s DNA, although she could not be excluded as a contributor. Also, he notes, there was no apparent physical trauma to S.'s vagina or anus. S.'s testimony standing alone, however, was sufficient to support his convictions. *See State v.*

Montano, 121 Ariz. 147, 149, 589 P.2d 21, 23 (App. 1978) ("[O]ne witness, if relevant and credible, is sufficient to support a conviction."); *see also State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003) (physical evidence not required for conviction when totality of circumstances demonstrates guilt beyond reasonable doubt). And S.'s testimony was corroborated by other evidence—including a large bruise on her face where Lopez had struck her and other bruises, a 911 call she made during the attack, and the testimony of a police officer who arrived at the scene. And Lopez ignores evidence that S.'s DNA was found on his scrotum.

¶4 As to his kidnapping conviction, Lopez contends the evidence was insufficient because S. voluntarily went with him into the desert and "consented to everything that happened." But Lopez "knowingly restrain[ed]" S. within the meaning of the statute when he dragged her to the wall after striking her in the head, and it is clear he did so with the intent to sexually assault her. *See* § 13-1304(A)(3); *State v. Latham*, 223 Ariz. 70, ¶ 15, 219 P.3d 280, 283 (App. 2009) ("To satisfy the plain meaning of the kidnapping statute's restraint requirement, the defendant either must move the victim from place to place or confine the victim.").

¶5 Lopez also asserts S.'s testimony was not sufficiently credible to be presented to the jury and should have been excluded. He suggests her testimony was unreliable because it was tainted by her interviews with police and her description of events changed between interviews. But the fact S. previously had made inconsistent statements does not provide a basis to exclude her testimony. Lopez cites no authority, and we find none, suggesting a trial court should in these circumstances assess the

reliability of a witness's testimony before permitting that witness to testify. *See* Ariz. R. Evid. 601 ("Every person is competent to be a witness except as otherwise provided in these rules or by statute."); *State v. Alvarez*, 210 Ariz. 24, ¶ 17, 107 P.3d 350, 355 (App. 2005) ("A witness's reliability 'goes to the weight of the statements, not their admissibility.'"), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006), *quoting State v. Whitney*, 159 Ariz. 476, 484, 768 P.2d 638, 646 (1989); *see also Logerquist v. McVey*, 196 Ariz. 470, ¶ 51, 1 P.3d 113, 130 (2000) (trial judge not permitted to "comment on the reliability or credibility of testimony" much less "preclude the jury from hearing the testimony at all because the judge believes it to be unreliable or not worthy of belief"). Inconsistencies in a victim's account affect the weight, rather than the admissibility, of her testimony and are "appropriately the subject of cross-examination." *State v. Moore*, 222 Ariz. 1, ¶ 29, 213 P.3d 150, 158 (2009). Lopez's attorney had the opportunity to question S. about her statements to police during cross-examination, and he did so.

¶6 Lopez cites a number of cases that address testimony by child victims of sexual abuse and identification testimony. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (reliability "linchpin in determining the admissibility of identification testimony"); *United States v. Wade*, 388 U.S. 218, 229-30 (1967) (discussing pretrial identification); *State v. Leyvas*, 221 Ariz. 181, ¶¶ 7-9, 211 P.3d 1165, 1168 (App. 2009) (identification); *State v. Michaels*, 642 A.2d 1372, 1376-79 (N.J. 1994) (discussing effect of manipulative interrogation techniques on child-victim witnesses). But these cases are inapposite, either because they addressed situations where the reliability of testimony is

jeopardized by improper state conduct or because they involved unique issues of child witnesses. *See Wade*, 388 U.S. at 228 (state-compelled identification "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial"); *Michaels*, 642 A.2d at 1378 ("The debilitating impact of improper interrogation has even more pronounced effect among young children."); *see also* A.R.S. § 13-1416 (statement by child under age of ten describing sexual offense or physical abuse admissible if court finds statement reliable); A.R.S. § 13-4252 (recording of minor's oral statement admissible only if "statement was not made in response to questioning calculated to lead the minor to make a particular statement"). Lopez has provided no basis for us to apply the reasoning of the cases he cites to S.'s testimony. The jury was best situated to determine whether S. was credible in light of the evidence presented. *See State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007).

¶7 Lopez also argues the trial court erred "when giving the jury its initial jury instructions." In the body of his argument, however, he does not refer to preliminary jury instructions given by the court but instead to the final jury instructions it gave and statements the prosecutor made during jury selection. Specifically, he asserts the court and the prosecutor neglected to explain to the jury that the state must prove all elements of sexual assault beyond a reasonable doubt, including that "the act of sexual intercourse actually took place."

¶8 Based on our review, the trial court correctly instructed the jury as to the state's burden of proof and the elements of sexual assault in both its preliminary and final instructions. *See* § 13-1406(A) (defining sexual assault); *State v. Portillo*, 182 Ariz. 592,

596, 898 P.2d 970, 974 (1995) (approving reasonable doubt instruction). And, to the extent Lopez argues the prosecutor committed misconduct, we reject that claim. Even if we reasonably could categorize the prosecutor's statement as improper, as we noted above, the court correctly instructed the jury. We presume the jury followed those instructions in reaching its verdicts. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶9 Lopez's sentences were within the prescribed statutory range and were imposed lawfully. *See* A.R.S. §§ 13-703(C), (J); 13-1001(C); 13-1304(B); 13-1404(B); 13-1406(B), (C). Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and, having found none and having rejected the claims raised in Lopez's supplemental brief, we affirm his convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge